IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1021

MICHAEL R. WOOD,

Petitioner,

-vs-

FIVE POINTS SHOPPING CENTER,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Petitioner, MICHAEL R. WOOD, has filed a Petition praying for a Writ of Certiorari to issue to review a judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on September 16, 1980.

OPINION BELOW

The opinion of the Court of Appeals, not reported, and an opinion on a Petition for Reconsideration filed September 19, 1980, before the Court of Appeals of the Ninth Circuit are appended to the Petition herein.

JURISDICTION

It is the position of Respondent that this Court is without jurisdiction to hear this matter. The matter was before the Ninth Circuit on a Petition for Writ of Mandamus to review an Order

of Remand issued by the United States District Court for the Central District of California pursuant to Title 28 USC §1447(c). Such an Order for Remand is not reviewable on appeal or otherwise. 28 USC §1447(d).

QUESTION PRESENTED

The Petitioner has sought to bring this case within the parameters of Thermatron Products, Inc., v. Hermansdorfer, 423 US 336 (1976). It is the Respondent's position that this opposition will clearly show that this case does not fall within the very narrow parameters of the Thermatron case, supra.

STATEMENT OF THE CASE

This matter arose upon the Petitioner herein filing a Petition for

removal of civil action to the United States District Court for the Central District of California. Said Petition was filed on June 23, 1980. The action sought to be removed was an unlawful detainer (eviction) action filed in the Superior Court of the State of California for the County of Santa Barbara.

Paragraph 2A of the Petitioner's Petition for removal in the United States District Court reads as follows: "There is a complete diversity of citizenship in the aforesaid action in that the Defendant Michael R. Wood is a citizen of the State of California and George R. Wood is a citizen of Virginia. MacDonald Group, Ltd., a Nevada corporation, formerly Five Points Shopping Center, a Limited Partnership and presently dba Five Points Shopping Center. MacDonald Group, Ltd., is a

corporation duly incorporated by virtue of the laws of the State of Nevada and at all times has been a citizen of the State of Nevada." (Emphasis added) Paragraph 2D of Petitioner's Petition in the United States District Court read as follows: "The amount in controversy in the within action exceeds the sum of $10,000.00, exclusive of interest and costs;..."

The Respondent then filed a Notice of Motion to Remand, an Affidavit in Support of Motion to Remand and Points and Authorities in supports of its Motion. The Affidavit in Support of Motion to Remand placed into the record evidence that the MacDonald Group, Ltd., had its principal place of business in the State of California. The Memorandum of Points and Authorities in Support of the Motion to Remand made reference to 28 USC

§1441(b), which read in material part as follows: "...any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which the action is brought." (Emphasis added) The Memorandum then went on to point out that the Petitioner's moving papers in the United States District Court stated that he was a citizen of the State of California. The Respondent's Points and Authorities filed in the District Court also made reference to 28 USC §1332(c), which provides that a corporation's principal place of business will be deemed the state of its citizenship for removal purposes.

A hearing was then held before the Honorable William P. Gray, United States District Judge for the Central District

of California. That hearing was held on August 18, 1980. A transcript of that hearing was made and appended to Petitioner's PETITION FOR WRIT OF MANDAMUS AND A STAY PENDING HEARING AND DETERMINATION filed with the United States Circuit Court for the Ninth Circuit. In that transcript, Judge Gray made the following statement: "Well, I can't resolve the unlawful detainer case, but it does seem to me, based upon the papers that I have received, that there is probably no diversity. Even if there is diversity, less than $10,000.00 is involved, and it seems to me that what the Defendant is trying to do here is forestall or delay an unlawful detainer action, which is part and parcel of state law." (Reporter's Transcript, page 3, lines 24 and 25; and page 4, lines 1 through 6) Unfortunately,

later in the proceedings, at page 6, line 25, and page 7, line 1, Judge Gray did make the remark referred to on page 5 of the Petitioner's Petition in this matter.

REASONS FOR DENYING THE WRIT

When the entire procedural context and the spoken reason of the United States District Court are fully set forth, it is quite obvious that the Order of Remand was granted for the reasons set forth in 28 USC §1447(c), i.e., "...that the case was removed improvidently and without jurisdiction..." As such, the Order for Remand is not reviewable by this Court or any other court on appeal or otherwise. 28 USC §1447(d).

Notwithstanding 28 USC §1447(d), there has been a very narrow exception created by this Court for review of

Remand Orders were made for reasons other than as set forth in 28 USC §1447(c). That judicial exception is contained in the case of Thermatron Products, Inc., v. Hermansdorfer, 423 US 336. However, Justice White, when stating the question presented by the case at page 337, stated as follows: "The questions presented in this case are whether a federal district judge may remand a properly removed diversity case for reasons not authorized by statute, and, if not, whether such remand may be remedied by a Writ of Mandamus." (Emphasis added) This is simply not a case involving a properly removed state court action; but, on the contrary, it involves an improperly removed state court action, which was remanded for the avowed reason that there was no diversity and there was not sufficient dollars in

controversy. The mere fact of a statement made by the District Court judge that he would not be disposed to try an unlawful detainer action will not, and should not, negate the express prohibition contained in 28 USC §1447(d). In the Thermatron Products case, supra, the trial court, when ordering the remand, had specifically noted that the case had been properly removed, but that his calendar was simply too crowded to take care of it. That is simply not the case here. Judge Gray first noted that he felt the case had not been properly removed and then, perhaps unfortunately, remarked that he was not disposed to try this particular kind of case under any circumstances.

CONCLUSION

For the reasons set forth above, a

Writ of Certiorari should not issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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